

Internal Revenue Service

memorandum

CC:TL-N-827-90

Br4:KAAqui

date: OCT 31 1989

to: District Counsel, St. Paul CC:STP

from: Assistant Chief Counsel (Tax Litigation) CC:TL

subject: [REDACTED]

Request For Tax Litigation Advice

By memorandum dated August 1, 1989, we advised that the refund claims filed by former and present employees of the above-referenced taxpayer in connection with the receipt of liquidated damages for Equal Pay Act claims should be maintained in a suspense status. Because of recent appellate losses in this area, we have concluded that further litigation would be fruitless and hereby revoke our previous advice and recommend that the claims for refund be allowed in accordance with the courts' holding in Thompson v. Commissioner, 89 T.C. 632 (1987), aff'd, 866 F.2d 709 (4th Cir. 1989). However, care should be exercised by Service personnel to establish that a taxpayer's claim is for liquidated damages under the Equal Pay Act to ensure that no exclusion is allowed for payments which represent back pay, front pay and lost benefits. Compare Thompson v. Commissioner, supra, with Wirtz v. Commissioner, T.C. Memo. 1989-139.

The Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et seq. was enacted to protect certain groups from substandard wages and excessive hours which endangered the national health and well being by providing for minimum wages, maximum hours, and overtime compensation. Section 216(b) of Title 29 states that an employer who violates these provisions is liable for the unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages.

The Equal Pay Act (EPA), 29 U.S.C. § 206(d) was enacted as an amendment to the FLSA which serves as the procedural and remedial framework for Equal Pay Act claims. Thus, an employer who discriminates in the payment of wages because of the employee's gender is similarly liable for back pay and for liquidated damages unless the employer shows that his conduct was in good faith.

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The enforcement provisions of the FLSA also apply to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et. seq. except that liquidated damages are not available to the affected employee absent a showing that the employer's conduct was willful.

In Thompson v. Commissioner, 89 T.C. 632 (1987), aff'd, 866 F.2d 709 (4th Cir. 1989), the courts held that liquidated damages awarded to a prevailing EPA plaintiff were excludible under I.R.C. § 104(a)(2). Although we did not seek certiorari, we hoped to create a conflict by litigating a similar case in the Tax Court. This opportunity arose in Rau v. Commissioner, T.C. Docket No. 6370-89 and the field was so advised. Subsequently, the Tax Court held that liquidated damages awarded in an ADEA case were also excludible. Rickel v. Commissioner, 92 T.C. 510 (1989), on petitioner's appeal, (3d Cir. No. 89-1529). The Tax Court rejected our argument that because Congress intended them to be punitive in nature, TWA Inc. v. Thurston, 409 U.S. 111, 125 (1985), liquidated damages awarded in ADEA cases are not excludible. See Rev. Rul. 84-108, 1984-2 C.B. 32. This office recommended that a cross appeal be filed in Rickel.

In Byrne v. Commissioner, _____ F.2d _____ (3d Cir. Aug. 22, 1989) aff'g and rev'g, 90 T.C. 1000 (1988), the court held that damages awarded under 29 U.S.C. § 216(b) were for personal injury tort or tort like rights. Because of the mounting adverse precedent in the area and the Byrne appellate opinion, the Tax Division, Justice Department, recommended no cross appeal of the Rickel decision.

On September 27, 1989, a conference was held with the Special Appellate Counsel to discuss these conflicting recommendations in particular and the trend of the courts in general. It was agreed that the appellate opinion in Byrne would control the disposition of the Rickel appeal. Furthermore, a much better appellate vehicle had appeared in Miller v. Commissioner, 93 T.C. No. 29 (1989), where the Tax Court held squarely that punitive damages awarded in a personal injury (defamation) action are excludible. Unlike the Third Circuit which appeared committed to affirm Rickel, the Fourth Circuit, the appellate forum in Miller, is uncommitted on whether the statutory language "any damages" is sufficiently broad to encompass punitive damages.

It was also agreed that the Third Circuit's holding in Byrne that liquidated damages awarded under 29 U.S.C. § 216(b) are excludible has sounded the death knell for the prosecution of any appeal of cases arising thereunder. Moreover, we have now

concluded that because the effective date of pending legislation 1/ is July 10, 1989, cases in the administrative pipeline and docketed cases involving EPA claims should be conceded.


Thus, we have withdrawn our recommendation of cross appeal in Rickel and by separate memorandum of this date advised that Rau v. Commissioner, be conceded in accordance with the guidelines stated earlier.

If you have any questions concerning this matter please contact Mr. Keith A. Aqui at 566-3308.

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1/ Section 11641 of H.R. 3299, 101st Cong., 2nd Sess. would limit the exclusion to amounts received on account of "physical injuries or physical sickness", thus eliminating substantial litigation in this area.